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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

SHELDON R. TELLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Sheldon R. Teller, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit affirming his judgment of conviction of the sale, barter, exchange of heroin to another, not pursuant to the required written order in violation of Title 26, U.S.C. Section 4705(a) (Count I); the receipt, concealment and sale, and the

facilitation thereof of the same narcotics on the same date, in violation of Title 21, U.S.C., Section 174 (Count II); the receipt, concealment, and sale, and the facilitation thereof, of heroin, marijuana and cocaine on another occasion, in violation of, respectively, Title 21, U.S.C., Section 174, Section 176(a) and Section 174 (Counts III, IV and V).

In Counts I and II, he was charged and convicted together with a co-defendant, one John D. Sullivan. On Counts III, IV and V, he was charged and convicted alone.

Opinion Below

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this Petition (App. 1).

Jurisdiction

Judgment of the Court of Appeals was entered on June 13, 1969 (App. 13). A timely Petition for Rehearing was denied on July 7, 1969 (App. 14). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented For Review

1. Where a State Statute does not offend against any of the first eight Amendments to the Constitution of the United States, can Federal Courts, in effect, void the effectiveness of the State law as to Federal agents and courts within its boundaries, and is not such voiding contrary to the Ninth and Tenth Amendments to the Constitution of the United States? (*Griswold* v. *Connecticut,* 381 U.S. 479).

2. Where citizens of the sovereign State of Illinois, through their legislative representatives, have out-lawed electronic eavesdropping, does not this decision of the

lower court, which repeals the State Statute where federal offenses are concerned, offend against the Ninth and Tenth Amendments to the Constitution of the United States?

3. In Illinois, where its citizens have, in their regard for their "right of privacy," passed a statute forbidding electronic eavesdropping without the consent of ALL parties to the communication, can federal courts repeal such a law by holding its terms not applicable to federal agents and courts within the State's boundaries, and still conform to the requirements of the Ninth and Tenth Amendments?

4. Do not the Ninth and Tenth Amendments protect the rights of citizens of the sovereign State of Illinois to pass laws relating to police power — laws which are not contrary to the first eight amendments to the Constitution of the United States — and to have such laws obeyed by federal agents and respected by federal courts?

5. Can federal courts permit federal agents to violate State laws against eavesdropping on the basis that this court's rules —"procedural" in express intent — repeal the substantive law of the State of Illinois?

6. Does an affidavit on which a search warrant issues, which recites no factual basis to believe "certain property, namely money" will be found on residential premises satisfy the Fourth Amendment?

7. Where an affidavit on which a search warrant issues recites no basis for believing an identified informant and no corroboration of his information, is the reasonable cause requirement of the Fourth Amendment satisfied?

Constitutional Provisions, Statutes and Rules Involved

Amendment IX, Constitution of the United States:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment X, Constitution of the United States:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Chapter 38, Article 14, Illinois Revised Statutes, Section 14-1:

> "(a) Eavesdropping device.
>
> "An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.
>
> "(b) Eavesdropper.
>
> "An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.
>
> "(c) Principal.
>
> "A principal is any person who:
>
> (1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or

(2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or

(3) Directs another to use an eavesdropping device illegally on his behalf."

Section 14-2:

"A person commits eavesdropping when he:

"(a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or

"(b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device."

Section 14-4:

"Any person convicted of eavesdropping shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both, or imprisoned in the state penitentiary from one to two years."

Section 14-5:

"Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings; provided, however, that so much of the contents of an alleged unlawfully intercepted, overheard or recorded conversation as is clearly relevant, as determined as a matter of law by the court in chambers, to the proof of such allegation may be admitted into evidence in any criminal trial or grand jury proceeding brought against any person charged with violating any provision of this Article."

Rule 26, Federal Rules of Criminal Procedure, Title 18, U. S. C.:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided

by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Rule 57(b), Federal Rules of Criminal Procedure, Title 18 U. S. C.:

"(b) *Procedure not Otherwise Specified.* If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

Statement of the Case

This petitioner was convicted on all counts of a five count indictment returned July 26, 1966, and described hereinbefore (A. 2-5). On September 26, 1966, a motion to suppress evidence seized on July 23, 1966 at 9736 South Longwood Drive, Chicago, Illinois (Petitioner's residence) was made on the ground that the warrant was insufficient, the property seized was not described, and for failure of probable cause for the issuance thereof (A. 5-7). On September 30, 1966, the government filed an answer to the motion generally denying the insufficiency and illegality and the want of probable cause alleged (A. 8-9). After hearing on October 31, 1966 (A. 18-35), the motion was denied (A. 33).

The trial proceeded forthwith and continued through November 10 of that year, upon which date a verdict of guilty as charged was returned as to this petitioner, judgment entered thereon, and concurrent sentences of eighteen years were imposed on each count (A. 10-11). He was denied bail pending appeal and has been incarcerated since that date (approximately 20 months).

This petitioner's Motion for Judgment of Acquittal notwithstanding the verdict, or, in the alternative, for a new trial was filed on November 16, 1966 (A. 12) and denied. This petitioner filed his Notice of Appeal to the United States Court of Appeals on November 22, 1966.

After the submission of briefs, the matter came on for argument before that Court on January 8, 1968, and on October 16, 1968, the United States Court of Appeals issued the following order:

> "The above cause was argued in this court on January 8, 1968, and submitted to the court for decision. For the reason that one of the questions in the above cause might be affected by this court's final determination of Nos. 16021-16022, United States of America v. James A. White, now under submission following an en banc hearing, IT IS ORDERED that the decision in the above cause on appeal be held in abeyance until the final determination of the case United States of America v. James A. White, or until further order of this court."

On January 7, 1968, the United States Court of Appeals for the Seventh Circuit, sitting en banc, approved and endorsed the prior holding in *White* of the three judge panel, holding:

> "On the basis of the constitutional principles set forth in *Katz* and our understanding of the protection which the fourth amendment was drawn to provide, we are of the opinion that the surreptitious monitoring of the defendant's conversations was a naked violation of his rights and that the resultant seizure of his statements was not made in conformity with the provisions of that amendment." (Op. 16021-16022, January 7, 1969, p. 14)

United States v. *White* is now pending before this Court on a grant of certiorari on the petition of the United States

(No. 46 (1024)), apparently on the basis of a conflict between the Seventh Circuit and the Second and Fifth Circuits (see pp. 3 and 4, Gov't Petition for Cert.), and/or that the "uninvited ear" rule in *Katz* v. *United States*, 389 U.S. 347, upon which *White* was principally decided should not be retroactively applied. See *Desist* v. *United States*, 349 U.S. 244.

Heeding the prospective application direction of *Desist*, the Court of Appeals for the Seventh Circuit found the law enunciated in *On Lee* v. *United States*, 343 U.S. 747, applicable to this case, and affirmed the conviction.

The Evidence

We have no basic quarrel with the summary of the evidence as propounded by the United States Court of Appeals in its opinion. Nor do we contest that the evidence — taken in the light most favorable to the government, if legally obtained — supports conviction. Therefore, we adopt as this statement, the evidence as that Court found it to be:

> "At 6:00 p.m. on July 14, 1966, Samuel Washington, a government informant, telephoned defendant Teller with narcotics agent Jackson listening on an extension phone. Later that evening narcotics agents searched Washington and equipped him with a Kel-set transmitter. Agent Jackson then drove Washington to the south side of Chicago. Washington met defendant Sullivan, got in his car and rode with him. While the two rode together, narcotics agent Hill overheard their conversation on a Kel-set receiver tuned to Washington's transmitter. Washington told Sullivan that he wanted to restock, and gave Sullivan $1,500 in currency whose serial numbers had been recorded by government agents. Sullivan responded that he would have to see

'Shelly' first. The two men arranged to meet the following day when Washington said he would have additional money.

"A week later Jackson listened to various telephone conversations between Washington and Teller during which they arranged a meeting later that night. Before this meeting Washington was again searched, equipped with a Kel-set transmitter, and given recorded currency. Washington met both defendants, told Teller that he wanted one-fourth of a 'kilo' of heroin, that he had $3,000, and asked when he could get it. Sullivan said it would be later, and Washington told defendants he would await their call at his motel room. Agent Hill overheard this conversation on his Kel-set receiver.

"The next day agent Jackson listened while Washington talked to each defendant on the phone. Teller told Washington he had not met him because narcotics agents were in the vicinity. Washington arranged to meet both defendants at the rear of another motel to which he had moved. Agent Jackson saw defendants drive to the meeting place in a police car and saw Teller get out and bend down near a pole at the rear of the motel. After they had driven away, Jackson went to the pole, picked up a rolled-up black sock, examined it and replaced it. The defendants soon returned. Washington, equipped with a Kel-set, entered their police car. Teller told Washington that he had the heroin and needed his money in order to 'cop' (restock) as he was out of the 'stuff.' He told Washington that his 'stuff' was at the base of the pole. Agent Hill overheard this conversation on his Kel-set receiver. Washington left defendants' police car, found the rolled-up sock, and delivered it to agent Jackson.*

* If it is not already apparent, Agent Jackson testified, in corroboration of the undercover Agent Washington, to the foregoing events. (Footnote added.)

"The Bureau of Narcotics determined, that same night, that the white powder inside a container in the sock was heroin. The agents obtained federal arrest and search warrants for defendants and their residences.* In a search of Teller's residence the next morning, agents recovered heroin, cocaine and marijuana, another rolled black sock containing narcotics, together with narcotics-making apparatus and more than $45,000 in currency, including that previously recorded by the agents, given to Washington and passed

* The affidavit on which the warrant for the search of this petitioner's residence issued read as follows:

"AFFIDAVIT FOR SEARCH WARRANT

"BEFORE C. S. Bentley Pike, Chicago, Ill.

"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as dwelling and garage at 9736 S. Longwood Dr., Beverly Hills, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to wit, a violation of Title 21. Sec. 174. U.S. Code.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Information from Samuel Washington, that he paid Sheldon R. Teller, occupant of said premises $3,000 for narcotic drugs July 21, 1966.

"Carl L. Jackson, a U. S. agt. informed complainant he saw the delivery of the narcotics.

"Complainant furnished Washington with the money. According to agts. Rendna and Hughes they observed said Teller in possession of narcotic paraphernalia on May 4, 1966.

/s/ Charles E. Hill,
Signature of Affiant.
Narcotic Agent.

"Sworn to before me, and subscribed in my presence, July 23, 1966.

C. S. Bentley Pike,
United States Commissioner."

(Footnote ours, but in Opinion at App. 5-7).

by him to defendants. Simultaneously Sullivan's apartment was searched and agents there found several cards on which were recorded six automobile license numbers which had been assigned to narcotics agents." (App. 2-3).*

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* The affidavit on which the warrant issued for a search of the premises of petitioner's co-defendant (Counts I and II) read as follows:

"AFFIDAVIT FOR SEARCH WARRANT

"BEFORE C. S. Bentley Pike

"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as Apt. 409, Versailles Apartments, at 5234 So. Dorchester, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to-wit, a violation of Title 21, Sec. 174 U. S. Code.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Information from Samuel Washington, that he paid John Sullivan, occupant of said premises, $1500, for narcotic drugs July 14, 1966 and that he Sullivan was present when $3000 was paid to Sheldon R. Teller by him on July 21, 1966. Carl L. Jackson, a nar. agt. informed complainant he saw the delivery of the narcotics on July 22, 1966.

/s/ Charles E. Hill.
Signature of Affiant,
Narcotics Agent.

Sworn to before me, and subscribed in my presence, July 23, 1966.

C. S. Bentley Pike,
United States Commissioner."

(Footnote ours, but in Opinion at App. 7).

As to the over-heard phone conversations and the employment of the Kel-set (transmitter attached to Washington's person and received by Narcotics Agents), the Court of Appeals for the Seventh Circuit held:

> "The use of the Kel-set transmitter and receiver by agent Hill predates December 18, 1967, the retroactive limit of the rule in *Katz* v. *United States*, 389 U.S. 347 (1967), set by the Supreme Court in *Desist* v. *United States*, 349 U.S. 244 (1969). The Supreme Court in the *Katz* opinion departed from the 'trespass' theory of *On Lee* v. *United States*, 343 U.S. 747 (1952), testing the reasonableness of warrantless searches and seizures of informants' words. The *On Lee* rule consequently is the test of the unreasonableness of the use of the Kel-set before us. Under *On Lee*, since agent Hill did not trespass upon the persons or premises of defendants, his 'eavesdropping' did not violate defendants' constitutional rights. There was, therefore, no error in the district court's admission of agents' testimony.
> "This court on October 16, 1968 ordered decision on the appeal before us held in abeyance pending final disposition of the appeal in *United States* v. *White*, 405 F.2d 838 (1969). This court's opinion in the *White* appeal was filed January 7, 1969. The *White* decision was based principally on the Supreme Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which is not controlling here. The Supreme Court on April 8, 1969 granted certiorari applied for by the government in *White*. Despite the fact that granting of certiorari indicates that *White* is not final, it is our view that it would be imprudent to delay further decision in the appeal before us. The reasons are that we are convinced that no possible development with respect to *White* in the Supreme Court can influence our judgment we are now making in affirming the convictions here, and the necessity we feel of avoiding unnecessary delay in filing this opinion.

"We see no merit in defendant's contention that the Illinois Eavesdropping Act, ILL. REV. STAT., ch. 38, § 14-1, et seq. (1967), precludes the admission of Kel-set evidence in a federal trial. *United States* v. *Martin*, 372 F.2d 63 (7th Cir.), *cert. denied*, 387 U.S. 919 (1967). Since federal standards govern here there is no violation of the Tenth Amendment." (App. 5)

Concerning the searches, that Court held:

"We see no merit in defendants' challenge of the district court's denial of their motions to suppress the fruits of the searches on the ground that the affidavits on which the warrants issued were insufficient to establish probable cause. The affidavits are signed by narcotics agent Hill, and substantially state his belief that there is concealed money, fruit of violation of the narcotics laws, at the defendant's residence; that he had information from Washington that Washington had paid Teller $3,000 for narcotics; that he was informed by agent Jackson that Jackson had seen the narcotics delivered; that he had furnished Washington with the money and Washington paid the $3,000 to Teller; and that other named agents informed him they had observed Teller in possession of narcotics paraphernalia. This reasoning also applies to defendant Sullivan.

" * * * We think Hill's affidavits enabled the Commissioner to perform his neutral and detached function of determining probable cause. The affidavit declared the source of Hill's information and the basis of his belief that the money was the fruit of narcotics law violations. More important it informed the Commissioner of the circumstances underlying the narcotics sale. He could have reasonably concluded that Washington was a reliable informant. We think this a common sense interpretation of the affidavits. *United States* v. *Ventresca*, 380 U.S. 102 (1965). We hold that the affidavits sufficiently showed probable cause and that there was no error in the district court's denial of the motion to suppress." (App. 5-7).

REASONS FOR GRANTING THE WRIT

1. The exercise of this Court's supervisory power is required by the Ninth and Tenth Amendments where the Court of Appeals for the Seventh Circuit has negatived as to federal officers and federal courts the applicability of a state statute which in no way offends against the first eight amendments to the Constitution of the United States.

2. This court should exercise its supervisory power over a decision of the Court of Appeals for the Seventh Circuit which adheres to the principles enunciated by this court in *On Lee* v. *United States,* 343 U.S. 747 (1952) which did not involve electronic eavesdropping in a State where such eavesdropping had been forbidden by statute, and which decision is contrary to a State of Illinois statute forbidding eavesdropping (enacted in 1961) and a decision of the Supreme Court of the State of Illinois permitting electronic monitoring only where all parties consent to it.

3. This Court should grant certiorari to review a decision of the Court of Appeals for the Seventh Circuit which was decided in a way in conflict with applicable decisions of the Court in *Spinelli* v. *United States,* 393 U.S. 410, and *Aguilar* v. *State of Texas,* 378 U.S. 108.

1 and 2.

We do not question that the circumstances here bring this case factually within the scope of *On Lee* v. *United States,* 343 U.S. 505.

The peculiarity in this case stems from the existence of a local law which prohibits the use of an electronic eavesdropping device "without the consent of any party

thereto" (Ch. 38, Sec. 14-2, Ill. Rev. Stats). This is not the fact in *On Lee.* The Illinois Supreme Court (the supreme law of this state) has interpreted its statute to mean that "any party who has not consented to the recording or transmission of his conversation may bar its admission in evidence against him" (*People* v. *Kurth,* 34 Ill. 2d 387; 216 N.E. 2d 154, 158).

The State of Illinois has a unique status and its unique status has been recognized by this Court. Forecast by this Court's decision in *Lopez* v. *United States,* 373 U.S. 427, endorsing admission of relevant evidence except when obtained "by violating some statute," this Court, in *Berger* v. *United States,* 388 U.S. 41, recognized that Illinois prohibits "surreptitious eavesdropping by mechanical or electronic device," and does not even allow such eavesdropping under Court order (388 U.S. at 47-48). Of course, a state court's construction of a State statute is binding on this Court (388 U.S. at p. 68).

Totally ignoring the implications of these cases, and the mandate of the Tenth Amendment (the companion Amendment to the Ninth), the Court of Appeals for the Seventh Circuit held:

> "We see no merit in defendant's contention that the Illinois Eavesdropping Act, ILL. REV. STAT., ch. 38, § 14-1, et seq. (1967), precludes the admission of Kel-set evidence in a federal trial. *United States* v. *Martin,* 372 F.2d 63 (7th Cir.), *cert. denied,* 387 U.S. 919 (1967). Since federal standards govern here there is no violation of the Tenth Amendment." (App. 5).

United States v. *Martin,* 7 Cir., 372 F.2d 63 held, with a simplicity defying intelligent description that, notwithstanding the mandate of State law:

> "The admissibility of evidence in federal criminal prosecutions is governed by Rule 26, F.R.Cr.P., which

> provides ' * * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' This Rule does not make admissibility of evidence in federal courts dependent upon diverse state laws; rather, it seems to envision a uniform federal practice in all federal criminal cases." 372 F.2d at p. 66.

And, reasoned the Court of Appeals for the Seventh Circuit, since certain federal courts allow admission of Kel-set eavesdropping evidence, the expediency of uniformity demands Illinois conform in violation of its own statutes, so long as it envisions a federal case tried in federal courts. Illinois did not feel that way in *People* v. *Kurth:*

> "Many Federal cases and cases from other jurisdictions hold that if one party to a recorded conversation consents to the recording the evidence is admissible, even though the consenting party is the one who is making the recording or carrying a concealed transmitting device without the knowledge of the other parties. These authorities are of little assistance to us in construing the above provisions for they do not involve a statute in any way similar to the one in this case." 216 N.E.2d at 158.

There are no statutes of the United States, nor express rules of this Court which govern eavesdropping evidence. There are no principles of the common law to guide its admission or exclusion, such devices being unknown to the common law. More precise than the generalities of Rule 26 are the proscriptions of Rule 57(b) which allows any procedure not inconsistent with any applicable statute. Or, more directly put, forbids any procedure at odds with an applicable statute. That is precisely what obtains here.

The procedure offends duly enacted statutes. We do not believe it was the intention of this Court, in enacting its procedural rules, to assert the power of repeal of any State legislature. We do not think this Court so intends. Almost thirty years ago, this Court denied any such suggestion:

> "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts." (*Sibbach* v. *Wilson & Co.*, 312 U.S. at pp. 9-10).

We recognize *Sibbach* was a civil case, but we think the reasoning apposite. This Court, by its Rules, has never essayed to declare substantive state law, or to repeal it.

We think that *On Lee*, insofar as it relies on *Olmstead* v. *United States*, 277 U.S. 438, 468, in holding that "violation of state law . . . would not render the evidence obtained inadmissible in federal courts" (343 U.S. at 754), is overruled by this Court's decision in *Berger* v. *State of New York*, see Justice Douglas' concurring opinion, 388 U.S. at p. 64. We also submit such overruling is patently correct, as such *obitur* in *On Lee* (quoted *supra*), constitutes a diminishment of the Tenth, and necessarily the Ninth, Amendments. As Mr. Justice Frankfurter said in his dissent in *On Lee:*

> "What is perhaps even more noteworthy is its pervasive disregard in practice by those who as law officers owe special obedience to law. What is true of the federal Act against wiretapping and its violations is widely true of related state legislation and its disobedience." 343 U.S. at 759.

Is there any difference between a State trespass violation and this? (Compare Mr. Justice Burton's dissent, 343 U.S. at 765).

The eavesdropping statute of the State of Illinois offends against none of the first eight amendments. The ninth and tenth amendments were enacted to protect the citizens of the State of Illinois, as well as her sister states. They constitute an independent source of rights protected from infringement by the federal government. (See Justice Goldberg's concurring opinion in *Griswold* v. *State of Connecticut*, 381 U.S. at 492-3).

It is not for this Court, by its rules or otherwise to substitute its beliefs for the judgment of state legislative bodies (idem, at p. 496). This Court, and no federal court sits "to determine the wisdom, need and propriety of laws which touch economic problems, business affairs, or social conditions." (*Griswold* v. *State of Connecticut*, 381 U.S. 479, 482).

If this Court's grant of certiorari in *United States* v. *White* (No. 46 (1024)) was based on the grounds asserted by the government in its Petition therefor (a simple conflict in decisions between the Seventh and the Second and Fifth Circuits), it proceeds on a false postulate. There are no states in either the Fifth or the Second Circuits that have a statute comparable to that of Illinois.

We urge this Court grant certiorari in this case — preferably as a companion case with *White* — for a complete exploitation of the serious constitutional questions involved.

3.

An examination of the affidavit reveals the following serious and basic defects. First, Samuel Washington obviously is not an agent or at least he is not so described to be an agent. Under the law in *Jones* v. *United States*, 362 U.S. 257, there is no indication that, if he were ever before an informant, he had previously given accurate information. The basis for accepting Samuel Washington's statement is not set forth His story was not corroborated by other sources of information. There is no statement in the search warrant as to where he paid Sheldon R. Teller the sum of $3,000. The affidavit merely states that Sheldon R. Teller was an occupant of the premises. Moreover the payment, if any, occurred on July 21, 1966 and the affidavit for the warrant is dated July 23, 1966. There is no indication on the face of the affidavit as to whether or not the money was paid at the premises which would give rise to some "suspicion" that the money might still be there. But it cannot be assumed that the payment was at the premises and that, therefore, the money "probably" was still there.

The second sentence states that Carl L. Jackson, a narcotic agent, informed the complainant, who is Charles Hill, that he, Jackson, saw the delivery of the narcotics. The affidavit does not state that Teller delivered the narcotics. The affidavit does not state that the delivery had anything to do with the premises to be searched. That statement in no way connects either Teller or the premises with the delivery of any narcotics.

The next sentence indicates that the complainant, who is Charles Hill, furnished Washington with the money. There is nothing in that statement which in any way connects Teller or the premises with the sum of $3,000. It does not

even appear from the affidavit that the money was recorded in which case it could be identified as "fruits of a crime".

The last sentence states that two agents observed Teller in possession of narcotic paraphernalia on *May 4, 1966.* This, of course, has nothing to do with the premises. The words narcotic paraphernalia are not otherwise described.

The court below overlooked a very important, and basic, point of argument in this cause in that it ignored the requirement that there must be stated in any application for search warrant sound reason for believing the fruits, instrumentalities or, possibly even evidence of crime, will be found on the premises, so lately re-enunciated in *Spinelli* v. *United States,* 393 U.S. 410.

The affidavit filed by Agent Hill of the Federal Bureau of Narcotics, asking for the issuance of a warrant is set forth at pages 4 and 5 of the Court's opinion. (App. A, 5-7)

That affidavit will be examined in vain for any basis upon which Mr. Hill swore he reasonably believed that "money which is the fruit of a crime" was to be found on the premises searched. Moreover the alternative affidavits, naming Teller's premises in one search warrant and Sullivan's premises in another, bespeaks an uncertainty further implementing the lack of probable cause.

A reasonable ground for belief that fruits or instrumentalities of crime will be found on the premises is the very basis of the authority necessary to issue any search warrant. This Court in *Aguilar* v. *State of Texas,* 378 U.S. 108, made that point eminently clear where it stated at Page 114:

> "The magistrate must be informed of some of the underlying circumstances from which the informant

> concluded that *the narcotics were where he claimed they were . . .*" *Aguilar* v. *State of Texas,* 378 U.S. 108, 114. (Emphasis Ours.)

No place in the Affidavit for the Search Warrant does Mr. Hill even hint the premise upon which he swore that he has "probable cause to believe" that "money which is the fruit of a crime" was on those premises.

This warrant is the absolute equivalent of the obnoxious writs of assistance which authorized the examination of ships and vessels and persons found therein for the purpose of finding goods prohibited to be imported or exported, or on which the duties had not been paid; and to enter into and search any suspected vaults, cellars or warehouses for such goods.

If privacy is going to be invaded under warrant to search for fruits and instrumentalities of crime, probable cause must be shown to the magistrate that he might reasonably believe that the fruits and instrumentalities are on the premises. Whether or not the fruits and instrumentalities are in fact on the premises is immaterial as we know from so many abortive searches, but there must be a base on which to satisfy the probable cause requirement of our Constitution that they will be found on the premises. That is the very nexus of the Fourth Amendment to the Constitution of the United States. This warrant issued on nothing more than Mr. Hill's belief or suspicion that contraband would be found on the premises. No authority exists for breaching the security and privacy insured under the Constitution upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances.

The sustaining of the validity of the warrant in this case strikes at the very core of constitutionality secured privacy.

As this Court said in *Byars* v. *United States,* 273 U.S. 28, at page 29:

> "The information upon which the search warrant was issued states only that affiant 'has good reason to believe and does believe the defendant has in his possession' such intoxicating liquors, instruments and materials. The warrant clearly is bad if tested by the 4th Amendment and the laws of the United States."

These principles were reaffirmed by this Court recently in *Spinelli* v. *United States,* 393 U.S. 410.

Conclusion

Wherefore, for the above and foregoing reasons, this petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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